IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.839 of 1999
WITH
CRIMINAL APPEAL No.697 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VINUBHAI BATUKBHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 839 of 1999
MR US BRAHMBHATT for Appellant
MR KP RAVAL, APP for Respondent
2. Criminal Appeal No. 697 of 1999
MR KP RAVAL APP for Appellant
MR URVISH MALKAN for
MR JITENDRA MALKAN for Respondents

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 12/10/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Criminal Appeal No.839 of 1999 is filed by Vinubhai Batukbhai Patel (Savaliya), i.e. original accused No.1, under Section 374(2) of the Code of Criminal Procedure, 1973 ("the Code" for short) challenging judgment dated June 10, 1999 rendered by the learned Sessions Judge, Junagadh, in Sessions Case No.77 of 1997 by which he is convicted under Section 302 of Indian Penal Code ("IPC" for short) as well as Section 135 of the Bombay Police Act, 1951 ("the Act" for short), and sentenced to suffer R.I. for life and fine of Rs.1,000=00, in default, imprisonment for three months for commission of offence punishable under Section 302 IPC. No separate sentence is passed for commission of offence punishable under Section 135 of the Act.

Criminal Appeal No.697 of 1999 is filed by State of Gujarat under Section 378 of the Code challenging judgment dated June 10, 1999 rendered by the learned Sessions Judge, Junagadh, in Sessions Case No.77 of 1997 by which the respondents have been acquitted of the offences punishable under Sections 302, 201 read with 34 IPC and Section 135 of the Act.

As both the appeals are directed against common judgment dated June 10, 1999 rendered by the learned Sessions Judge, Junagadh, in Sessions Case No.77 of 1997, this Court proposes to dispose of them by this common judgment.

2. The facts emerging from the record of the trial Court are as under:

2.1 Samjubhai Ranchhodbhai Gadhiya is residing at village Moti Monpari, Taluka Visavadar, District Junagadh, and is cultivating his land. He has three sons and two daughters. At the time of incident, he was residing with his eldest son Limbabhai at village Moti Monpari. His daughter Liliben was married to deceased Hemrajbhai Kanjibhai Savaliya who was also residing at village Moti Monpari. His two other sons, Madhubhai and Babubhai, were residing at Junagadh.

2.2 On December 8, 1996, Madhubhai Samjubhai Gadhiya received a call from the deceased asking him to come to village Moti Monpari for the purpose of participating in compromise talks initiated by Batukbhai, who was original accused No.2, and his two sons, namely; the appellant and

Prafulbhai, who was original accused No.3, regarding dispute relating to boundary of field. On receipt of telephonic message, Madhubhai had gone to village Moti Monpari with his brother Babubhai and stayed at the house of his brother-in-law, i.e. Hemrajbhai. Madhubhai in the company of his brother Babubhai and deceased Hemrajbhai had visited vadi and found that a portion of land belonging to his brother-in-law was encroached upon by Batukbhai. After inspecting the site, all had returned to the house of deceased Hemrajbhai. Babubhai had some work at Junagadh and, therefore, he had left for Junagadh asking Madhubhai to come to Junagadh after dispute was settled between deceased Hemrajbhai and Batukbhai. Accordingly, Madhubhai had stayed at the house of deceased Hemrajbhai. At about 8.00 p.m. on December 9, 1996, Madhubhai in the company of deceased Hemrajbhai and Ghelabhai Madhabhai Savaliya as well as Parsottambhai Madhabhai had started going to the house of Batukbhai for the purpose of arriving at a settlement regarding dispute of boundary of the field. On way, all four had found that Batukbhai Hirjibhai, i.e. original accused No.2 as well as the appellant and his brother Prafulbhai, i.e. original accused No.3, were coming from opposite direction. It was noticed by Madhubhai that the appellant had a knife in his hand whereas original accused Nos.2 and 3 had sticks with them. The case of the prosecution is that the appellant had inflicted a knife blow on the chest of the deceased and, therefore, the deceased, who was lame, had started running to save his life, but was chased by the appellant and original accused Nos.2 and 3. According to the prosecution, the deceased was overtaken and the appellant had inflicted further two to three blows of knife on him and injured him seriously whereas original accused Nos.2 and 3 had inflicted stick-blows on him asking the appellant to kill him. Meanwhile, Madhubhai, who was accompanying the injured, had gone to his rescue and caught the appellant from behind so as to prevent him from inflicting further blows and in that process, had sustained an injury on palm of left hand. Ghelabhai and Parsottambhai, who were also with the deceased, had come to the place where Hemrajbhai was assaulted. Jaisukhbhai Dhirubhai, who is relative of the appellant, and Madhubhai had also come at the place of incident and caught hold of the appellant. As Hemrajbhai had sustained serious injuries, Jaisukhbhai had attended him and, during this time, the appellant, who was caught on the spot, as well as his father and brother had made good their escape from the place of the incident. Injured Hemrajbhai was removed to Visavadar Hospital in a jeep of one Sudhirbhai. On arrival at the hospital, Doctor on duty had declared him `dead'. During

night hours, PSO had sent a D.O. letter to Mr.P.O.Bhatt, who was then PSI of Visavadar Police Station, mentioning that dead body of deceased Hemrajbhai was brought to Government Dispensary with injuries and, therefore, necessary action should be taken. On receipt of message, PSI had gone to Visavadar Hospital and recorded complaint of Madhubhai Samjubhai. The complaint was forwarded to PSO of the Police Station for registration of offences. After registration of offences, the complaint lodged by Madhubhai was handed over to PSI Mr.Bhatt for investigation. The Investigating Officer had held inquest on the dead body of the deceased and made arrangements to send the dead body for postmortem examination. On December 10, 1996, the Investigating Officer had drawn panchnama of place of incident and seized certain incriminating articles as well as recorded statements of those persons who were found to be conversant with the facts of the case. The appellant, his father and brother were arrested from the house of Batukbhai, i.e. original accused No.2. While in custody, the appellant had made disclosure statement pursuant to which the knife used in commission of crime by the appellant was discovered from tube like part of petticoat put on by Bhavnaben, i.e. sister of the appellant, who was travelling at that time on motorcycle driven by one Hareshbhai, i.e. original accused No.5. The knife was found to be bloodstained and, therefore, seized under a panchnama. According to the prosecution, the appellant and original accused Nos.4 & 5 had caused disappearance of the knife which was used in commission of offence, and had, therefore, committed offence punishable under Section 201 read with Section 34 IPC. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, charge-sheet was submitted by the Investigating Officer against the accused in the Court of learned Judicial Magistrate First Class, Visavadar, for commission of offences punishable under Sections 201, 302 & 34 IPC and Section 135 of the Act. As offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Court of Sessions at Junagadh for trial where it was numbered as Sessions Case No.77 of 1997.

3. Exhaustive and self-explanatory charge was framed by the learned Sessions Judge, Junagadh, against the accused at Exh.5 for commission of offences punishable under Sections 302, 201 read with Section 34 IPC. Original accused Nos.1 to 3 were also charged for commission of offence punishable under Section 302 read

with Section 34 IPC and Section 135 of the Act whereas original accused Nos.1, 4, and 5 were charged for commission of the offence punishable under Sections 201 read with 34 IPC. The charge was read over and explained to the accused, who pleaded not guilty to the same, and claimed to be tried. The prosecution, therefore, examined; (1) Dr.Gopalbhai Kadvabhai as P.W.-1, Exh.17; (2) Maksood Ahmed Ibrahim as P.W.-2, Exh.24; (3) Madhubhai Samjubhai as P.W.-3, Exh.29; (4) Jaisukhbhai Dhirubhai as P.W.-4, Exh.33; (5) Ghelabhai Madhabhai as P.W.-5, Exh.34; (6) Lilaben Samjubhai as P.W.-6, Exh.35; (7) Babubhai Samjubhai as P.W.-7, Exh.36; (8) Santokdas Tulsidas as P.W.-8, Exh.37; (9) Dhirubhai Samabhai as P.W.-9, Exh.39; (10) Dhanjibhai Savjibhai as P.W.-10, Exh.41; (11) Mansukhbhai Devrajbhai as P.W.-11, Exh.43; (12) Balubhai Savjibhai as P.W.-12, Exh.44; (13) Madhubhai Desurbhai as P.W.-13, Exh.65; (14) Pradeepbhai Odhavji Bhatt as P.W.-14, Exh.67; (15) Jethabhai Pujabhai as P.W.-15, Exh.70; and, (16) Gunvantray Nandlal Vyas as P.W.-16, Exh.77, to prove its case against the accused. Documentary evidence such as postmortem notes of the deceased at Exh.19; certificate of injuries of Madhubhai at Exh.21; panchnama of deceased of clothes of the deceased at Exh.22; map of place of incident at Exh.27; First Information Report at Exh.32; panchnama indicating holding of inquest on dead body of deceased Hemrajbhai at Exh.38; panchnama of place of incident at Exh.40; panchnama indicating discovery of knife pursuant to disclosure statement made by the appellant at Exh.42; panchnama indicating discovery of sticks pursuant to disclosure statements made by original accused Nos.2 and 3 at Exh.45; report of Serologist at Ex.62; Notification issued by the competent authority under Section 37 of the Bombay Police Act, 1951 at Exh.63, entries from station diary at Exhs.71 & 76 etc. was also produced in support of the prosecution case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In their further statements, the case of the accused was that of denial, but no evidence was led by any of them to substantiate their claim that they were innocent.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Hemrajbhai died a homicidal death. According to the

learned Judge, it was established by the prosecution that the appellant had caused death of the deceased by inflicting knife blows on the deceased and was, therefore, liable to be convicted under Section 302 IPC, but it was not proved by the prosecution that original accused Nos.2 & 3 had shared common intention of the appellant to cause murder of the deceased and, therefore, they were not liable to be convicted under Section 302 read with Section 34 IPC. What was deduced by the learned Judge was that no satisfactory evidence was led to establish that original accused Nos.1, 4 & 5 had committed offence punishable under Section 201 read with Section 34 IPC nor satisfactory evidence was led to prove the charge that the original accused Nos.2 & 3 had committed offence punishable under Section 135 of the Act, but satisfactory evidence was adduced by the prosecution to prove its case that the appellant had committed offence punishable under Section 135 of the Act. In view of abovereffrerredto conclusions, the learned Judge has convicted the appellant under Section 302 IPC as well as Section 135 of the Act and imposed sentence referred to earlier, but acquitted the original accused Nos.2 to 5 by judgment dated June 10, 1999, which has given rise to these two appeals.

6. Mr.U.S.Brahmbhatt, learned counsel of the convicted appellant, contended that Madhubhai had sustained simple injuries which could have been caused by himself and as the prosecution has failed to prove that he had sustained injuries in the incident, his presence at the time and place of the incident becomes highly doubtful. It was argued that though the Police had given yadi to Madhubhai on December 9, 1996 itself so as to enable him to take treatment for his injuries, the record shows that he had, in fact, taken delayed treatment on December 10, 1996 for which he has not given any explanation and this makes the claim of the prosecution doubtful that the incident in question was witnessed by Madhubhai. According to the learned counsel of the convicted appellant, the investigation of the case was unfair which is quite evident from the fact that though 10 ml. of blood of the deceased was taken as sample, Forensic Science Laboratory had received 4 ml. of blood for analysis regarding which no explanation is offered by the Investigating Officer and, therefore, reasonable benefit of doubt to which the convicted appellant is entitled to, should be given to him. It was contended that the evidence regarding discovery of knife is highly doubtful because the evidence on record shows that the knife, which was discovered pursuant to disclosure statement made by the convicted accused is available in

market and, therefore, the evidence regarding discovery of knife should not have been relied upon by the trial Court. What was maintained by the learned counsel of the convicted appellant was that witness Jaisukhbhai had, in fact, not witnessed the incident nor caught the convicted appellant and, therefore, the case which largely depends on the testimony of Madhubhai should have been disbelieved by the learned Judge of the trial Court more particularly when the conduct of Madhubhai was unnatural. According to the learned counsel of the appellant, the learned Judge of the trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal filed by the convicted appellant should be accepted.

7. Mr.K.P.Raval, learned counsel of the State Government, contended that the testimony of eye witness, Madhubhai, gets complete supports from the testimony of witness Jaisukhbhai as well as testimony of witness Ghelabhai and, therefore, the learned Judge of the trial Court did not commit any error in placing reliance on his testimony for convicting the appellant under Section 302 IPC. According to the learned Additional Public Prosecutor, the testimony of Madhubhai also gets full corroboration from the medical evidence on record regarding injuries sustained by the deceased and, therefore, the trial Court was justified in acting upon his testimony more particularly when he himself was injured in the incident. What was maintained by the learned counsel of the State Government was that the testimony of witness Dhanjibhai Savjibhai read with that of the Investigating Officer would indicate that pursuant to disclosure statement made by the convicted appellant, knife used by him in commission of crime was discovered and the evidence of discovery of weapon also lends corroboration to the testimony of Madhubhai and other witnesses. It was asserted that neither Madhubhai nor for that purpose witness Jaisukhbhai or witness Ghelabhai was on inimical terms with the convicted appellant and, therefore, false implication of the convicted appellant in the incident stands totally ruled out. It was argued that Madhubhai had received simple injuries whereas the deceased was declared dead on arrival at the hospital and, as Madhubhai was busy attending the dead body of the deceased, he was not able to take treatment regarding his injuries during the night time of December 9, 1996, but that by itself would not affect the veracity of the evidence tendered by him. According to the learned Additional Public Prosecutor, the record of the case does not indicate that the conduct of Madhubhai was unnatural in any manner and, therefore, the grounds urged by the

learned counsel of the convicted appellant should not be accepted while considering the reliability or otherwise of evidence of witness Madhubhai. It was further argued by the learned Additional Public Prosecutor that the evidence tendered by the prosecution regarding discovery of knife at the instance of the convicted appellant is reliable, which is a circumstance against him, and is rightly taken into consideration by the learned Judge of the trial Court while determining the guilt or otherwise of the appellant. It was argued that the learned counsel of the convicted appellant has failed to dislodge the reasons recorded by the learned Judge of the trial Court for convicting the appellant under Section 302 IPC read with 135 of the Act and, therefore, the appeal should be dismissed.

8. So far as acquittal appeal is concerned, it was argued by Mr.K.P.Raval, learned counsel of the State Government, that the testimony of witness Madhubhai read with that of witness Jaisukhbhai and witness Ghelabhai establishes beyond doubt that original accused Nos.2 and 3 had also delivered stick-blows on the deceased after he had made an attempt to run away to save his life and, therefore, original accused Nos.2 and 3 should have been convicted under Section 302 read with Section 34 IPC. The reasons recorded by the learned Judge of the trial Court in paragraphs 39, 40 & 41 of the impugned judgment for acquitting original accused Nos.2 and 3 of the offence punishable under Section 302 read with Section 34 IPC were read over to the Court to emphasise that those reasons are contrary to the evidence on record and, therefore, the acquittal appeal should be accepted. It was also argued that the convicted appellant as well as original accused Nos.4 and 5 had caused disappearance of knife which was used in commission of crime and, therefore, the learned Judge of the trial Court was not justified in acquitting those accused of the offence punishable under Sections 201 read with 34 IPC. According to the learned Additional Public Prosecutor, the reasons assigned by the learned Judge for acquitting the respondents of the acquittal appeal are perverse and, therefore, the acquittal appeal should be accepted.

9. Mr.Urvish Malkan, learned counsel of the acquitted accused, contended that no reliable evidence has been adduced by the prosecution to establish that original accused Nos.2 and 3 had shared common intention of the convicted appellant to commit murder of the deceased and, therefore, acquittal of the respondents under Section 302 read with Section 34 IPC should not be regarded as erroneous. It was argued that complainant

Madhubhai was not able to state as to how many blows with stick were inflicted either by original accused No.2 or accused No.3 on the deceased whereas witness Jaisukhbhai has stated that he had not seen actual infliction of blows by original accused Nos.2 and 3 on the deceased and witness Ghelabhai says that he had also not seen the blows being inflicted by original accused Nos.2 and 3 and, therefore, well founded acquittal of those respondents should not be interfered with by the Court in acquittal appeal. The learned counsel emphasised that the case of the prosecution that original accused Nos.2 and 3 had assaulted the deceased with sticks does not get support from the medical evidence on record and, therefore, the acquittal appeal filed against them should be dismissed. It was emphasised that no reliable evidence could be adduced by the prosecution to prove that the original accused No.1, i.e. the convicted appellant and accused Nos.4 & 5 had caused disappearance of the knife which was allegedly used in commission of crime and, therefore, acquittal of the convicted appellant as well as original accused Nos.4 & 5 of the offence punishable under Sections 201 read with 34 IPC should be upheld by this Court. What was argued by the learned counsel of the respondents in acquittal appeal was that the learned Judge of the trial Court, who had advantage of observing demeanour of witnesses, has recorded cogent reasons for acquitting them of the offence punishable under Sections 302 read with 34 IPC and/or Sections 201 read with 34 IPC and as the learned Additional Public Prosecutor has failed to dislodge those reasons, the acquittal appeal should be dismissed.

10. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. The fact that deceased Hemrajbhai died a homicidal death is not in dispute before this Court. Madhubhai Samjubhai, who is complainant and one of the eye witnesses, has stated in his substantive evidence before the Court that deceased Hemrajbhai had received knife injuries. The injuries sustained by deceased are also enumerated in inquest panchnama which is produced on record of the case at Exh.38. The testimony of Dr.Gopalbhai Kadvabhai, P.W.-1 Exh.17, shows that he had received dead body of deceased Hemrajbhai on December 10, 1996 for postmortem examination and that he had commenced postmortem examination at 7.30 a.m. which was completed by 9.30 a.m. In his substantive evidence before the Court, the Medical Officer has enumerated external as

well internal injuries which were noticed by him while performing autopsy on the dead of the deceased. Those injuries are also mentioned in postmortem notes produced at Exh.19. Having regard to the nature of the evidence led by the prosecution, there is no manner of doubt that the prosecution has established that deceased Hemrajbhai died a homicidal death. The finding recorded by the learned Judge of the trial Court on this count being eminently just, is hereby upheld.

12. This brings the Court to consider the question whether the case against the convicted appellant is made out or not. In order to ascertain whether the charge of murder of deceased Hemrajbhai levelled against the appellant is proved or not, it would be relevant to refer to testimony of three witnesses. They are: (1) Madhubhai Samjubhai, P.W.-3, Exh.29; (2) Jaisukhbhai Dhirubhai, P.W.-4, Exh.33; and, (3) Ghelabhai Madhabhai, P.W.-5, Exh.34.

12.1 Witness Madhubhai Samjubhai, examined as P.W.-3 at Exh.29, has stated in his substantive evidence before the Court that there was a dispute regarding boundary of the field between Batukbhai, who is original accused No.2, and his deceased brother-in-law Hemrajbhai and, therefore, the deceased had called him on December 8, 1996 to participate in compromise talks which were scheduled to take place at the house of Batukbhai. It is mentioned by the witness that accordingly, he had gone to village Moti Monpari where the deceased was residing. This witness has mentioned before the Court that on December 9, 1996, he in the company of the deceased and two others namely; Ghelabhai Madhabhai and Parsottambhai Madhabhai had proceeded to the house of accused Batukbhai at about 8.00 p.m. and that when they had reached the market of the village at about 9.00 p.m., original accused No.2 was coming from the opposite direction with the convicted appellant and his another son Prafulbhai, i.e. original accused No.3. The witness had asserted before the Court that the convicted appellant was armed with knife and that without uttering anything he had inflicted knife blow on the chest of the deceased and, therefore, the deceased, who was lame, had started running to save his life. What is mentioned by this witness is that thereupon, the convicted appellant and original accused Nos.2 & 3 had chased him and overtaken him at a short distance after which the convicted appellant had inflicted further blows of knife on him whereas original accused Nos.2 and 3 had given stick-blows to him. The witness has further stated before the Court that thereupon he had gone to the rescue

of the deceased and caught the convicted appellant from behind so as to prevent him from inflicting further knife blows to the deceased, and that during that time, Ghelabhai Madhabhai and another person of the village, i.e. Jaisukhbhai, had also come at the place where the deceased was assaulted and that Jaisukhbhai Dhirubhai had caught the convicted appellant. The witness has further mentioned that witness Jaisukhbhai had made an attempt to attend the deceased and during that time, all the accused had run away. It is further mentioned by him that the deceased was removed to Visavadar Government Hospital in the jeep of one Sudhirbhai, but the doctor had declared the deceased dead. It is asserted by the witness that his complaint was recorded by PSI of Visavadar Police Station at Visavadar Government Hospital.

12.2 In his cross-examination, it was suggested to the witness that the dispute between the accused and the deceased relating to boundary of field was going on since two to three years and this suggestion was accepted by him. The suggestion made to the witness that he had gone with deceased Hemrajbhai to the house of accused Batukbhai for compromise on previous day of incident was also accepted by the witness. The further suggestion made by the defence that accused Batukbhai had asked him and Hemrajbhai to come on next day for compromise talks because his elder son Vinubhai, i.e. the convicted appellant, was not present, was also accepted by the witness. The case of the defence that near the place of incident, there is chawk of Ram-Mandir and that just adjoining otta of Ram-Mandir, there is a cycle shop, was also accepted by the witness. It was also admitted by the witness that on south of temple, there is house of pujari of the temple and adjoining to his house, building of telephone exchange is situated. However, the suggestion made by the defence that on otta of temple people were sitting till late night was denied by this witness. According to this witness, inquest on the dead body of deceased Hemrajbhai was held at Visavadar Government Hospital. The suggestion made by the defence that he had not informed the police about his injuries till morning of the next day was emphatically denied by him. According to this witness, he had stayed in the house of deceased Hemrajbhai in the evening of the day of incident and that in the company of the deceased, he had left for house of Batukbhai after taking supper. The cross-examiner had made an attempt to know from this witness as to in which manner the convicted appellant had held the knife, but it was stated by this witness that he was not knowing as to in which manner the knife was held by the convicted appellant. An attempt was also made to

know from this witness by the cross-examiner as to in which manner the convicted appellant had inflicted knife blows on the deceased when he was overtaken by the accused and it was stated by the witness that the convicted appellant had bent his legs and was inflicting knife blows on the deceased. It is further stated by the witness that when he had caught hold of the convicted appellant from behind, he had not touched any part of knife which was held by the appellant. Though other questions were put to the witness in cross-examination, they are not relevant and, therefore, not reproduced in this judgment.

12.3 Abovereferredto are the salient features which appear from the testimony of witness Madhubhai. This witness is closely related to the deceased and, therefore, would not allow the real culprit to go scot-free. Though the witness was cross-examined searchingly at length, it could not be suggested to him that he was on inimical terms either with the convicted appellant or with any of the accused. The witness has narrated the incident in a simple manner as he had seen it and has not exaggerated the incident at all.

12.4 The plea that yadi for his injuries was given to him on December 9, 1996, but he had taken treatment on December 10, 1996, which would indicate that he was not present at the time and place of incident nor received injuries in the incident, has no substance. It is relevant to notice that his real brother-in-law, i.e. husband of his sister, was fatally injured and, therefore, naturally he would be busy attending his brother-in-law. In fact, his complaint was also recorded at Civil Hospital after which inquest on the dead body of the deceased was held at the hospital. The testimony of Dr.Gopalbhai Kadvabhai shows that this witness had sustained minor injuries. Under the circumstances, taking treatment for his injuries on December 10, 1996 cannot be regarded as an unnatural conduct on his part. No major contradictions and/or omissions could be brought on record with regard to the incident in question. This witness stands completely corroborated by his First Information Report, which was lodged promptly and without loss of time, wherein all necessary particulars are mentioned. Further, the testimony of this witness regarding injuries sustained by the deceased gets complete corroboration from medical evidence on record. The Medical Officer has, in terms, stated that injury Nos.1 to 4 were possible by sharp-cutting instrument like a knife. No cogent grounds could be pointed out to the Court as to why testimony of witness Madhubhai should be

disbelieved.

12.5 The testimony of witness Madhubhai also gets corroboration from testimony of witness Jaisukbhai, P.W.-4, Exh.33. This witness has stated in his evidence before the Court that on the day of incident, he had gone to market of village for chewing pan at about 9.00 p.m., and when he had reached near open space in front of Ramji temple, he had found that Hemrajbhai Kanjibhai was lying on road and was profusely bleeding. What is mentioned by this witness before the Court is that at that time, the convicted appellant as well as original accused Nos.2 & 3 were quarrelling with the deceased and that the convicted appellant was armed with a knife whereas original accused Nos.2 & 3 had sticks with them. It is further mentioned by this witness that the convicted appellant had attempted to inflict a blow with knife on the deceased and that he with the help of Madhubhai had caught the convicted appellant and prevented him from inflicting further blows to the deceased. It is also mentioned by this witness that at that time, witness Ghelabhai Madhabhai and Parsottambhai were also present. According to this witness, the condition of injured Hemrajbhai was precarious and, therefore, witness Madhubhai, witness Ghelabhai and Parsottambhai had removed him to Visavadar Hospital and that he had subsequently learnt that injured had died. The witness has stated before the Court that the motive of the crime was dispute between the accused and the deceased regarding boundary of the field.

12.6 In his cross-examination, the witness has stated that he had gone to Pan shop for chewing pan and that he had visited the market for chewing after taking evening meal. According to this witness, he had found from a distance of 5 to 7 ft. that the deceased was lying on the ground in a bleeding condition. Though it was admitted by this witness that he had actually not seen the blows being inflicted by the convicted appellant, it was asserted by this witness in his cross-examination also that the convicted appellant was caught by witness Madhubhai and that he himself had also caught the convicted appellant. The suggestion made by the defence that his house is situated at a distance from the place where the deceased was lying on the ground, was emphatically denied by him. The further suggestion made by the defence that he was deposing falsely against the accused because he was relative of complainant, Madhubhai, was also emphatically denied by him.

12.7 On reassessment of evidence of this witness, this Court finds that the same is trustworthy and reliable.

If he had been a got-up witness and deposed at the instance of the complainant as suggested by the defence, he would have stated that he had seen accused No.1 inflicting knife blows on the deceased, but admittedly, such an attempt is not made by this witness at all. He has stated the facts which were witnessed by him without making exaggerations and/or embellishments. No major contradictions and/or omissions with reference to his earlier police statement could be brought on record to discredit his claim that the convicted appellant was present with knife near injured Hemrajbhai, who was lying on ground, and that he had caught the convicted appellant for preventing him from inflicting further blows. As the testimony of this witness does not suffer from serious infirmities, this Court is of the view that the same lends complete corroboration to the testimony of witness Madhubhai and proves the prosecution case against the appellant.

12.8 The testimony of witness, Ghelabhai Madhabhai, examined as P.W.-5, is recorded at Exh.34. The testimony of this witness is of such a sterling quality that it could not be assailed by the learned counsel of the convicted appellant at all. This witness has, in terms, stated that he in the company of Madhubhai, deceased Hemrajbhai and Parsottambhai had proceeded towards house of Batukbhai, i.e. original accused No.2, for the purpose of arriving at a compromise regarding dispute relating to boundary of field which was existing between the deceased and Batukbhai. The witness has stated in his testimony that they had left house of deceased at about 8.55 p.m. and reached near house of original accused No.2, but on way, they had found that the convicted appellant as well original accused Nos.2 and 3 were coming from opposite direction and that the convicted appellant was armed with a knife whereas original accused Nos.2 and 3 had sticks with them. What is mentioned by this witness before the Court is that the convicted appellant had given a blow with knife on chest of deceased Hemrajbhai and, therefore, Hemrajbhai had started running towards chora, which is in front of temple, to save his life, but he was chased by the convicted appellant, who had overtaken him and caused further injuries by inflicting knife blows. It was also stated by this witness that the convicted appellant was joined by accused Nos.2 and 3, who had inflicted stick-blows as a result of which, the deceased had sustained serious injuries, but Madhubhai had meanwhile arrived at the place of incident and caught convicted appellant from behind to prevent him from inflicting further blows. The witness has also claimed that at that

time, Jaisukbhai of his village had also come at the place of incident and caught the convicted appellant. According to this witness, dispute relating to boundary of the field was the cause of incident.

12.9 Though this witness was searchingly cross-examined at length, nothing could be brought on record by the defence which would make a dent in his claim that he had witnessed the incident. It is relevant to notice that this witness is also related to the accused. It could not be even suggested to this witness that he was on inimical terms with the accused and, therefore, was deposing falsely against them. According to this witness, normally, people are sitting near pan shop, but it was explained by this witness that the incident had taken place during the winter time and, therefore, no one was present at pan shop. The suggestion made by defence that several persons had collected at the place of incident because of the incident in question was emphatically denied by him. This witness was also asked other questions to impeach his credibility, but nothing substantial could be brought on record.

12.10 On reassessment of the testimony of this witness, it is found to be trustworthy and cogent. The evidence tendered by this witness does not suffer from vice of exaggeration or embellishments. No major contradictions and/or omissions with reference to his previous police statement could be brought to the notice of this Court. Under the circumstances, this Court is of the firm view that the learned Judge of the trial Court did not commit any error in accepting the testimony of this witness while determining the guilt or otherwise of the accused. Further, claim made by the two eye witnesses that the appellant had inflicted knife blows to deceased gets corroboration from medical evidence on record which is quite evident from testimony of Medical Officer recorded at Exh.17.

13. The plea that discovery of knife at the instance of the convicted appellant lends support to the prosecution cannot be accepted. As per the prosecution case, the convicted appellant while in police custody had made disclosure statement pursuant to which the knife used in commission of crime was recovered from tube like part of petticoat put on by Bhavnaben, who is sister of the convicted appellant. According to the prosecution, when the person of Bhavnaben was searched, a lady constable, Janaben, was present. However, the prosecution has not examined her as one of the witnesses.

Section 100(3) of the Code requires that where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency. No evidence is adduced by the prosecution to establish that the provisions of Section 100(3) of the Code were complied with. Further, the knife so recovered was not found to have the same blood group as that of the deceased. Therefore, having regard to the facts of the case, so-called evidence of discovery is of little assistance to the prosecution. However, there is no manner of doubt that merely because the evidence adduced by the prosecution regarding recovery of knife used in commission of crime is deficient or not satisfactory, that cannot be a ground to throw out the prosecution case when the same has been otherwise found truthful by credible evidence. This principle has been firmly stated by the Supreme Court in Rajinder & Ors. v. State of Haryana & Anr., 2004 A.I.R. SCW 5029.

14. The net result of the above discussion would be that the testimony of witness Madhubhai read that of witness Jaisukhbhai and witness Ghelabhai establishes that the convicted appellant had inflicted knife blows on the deceased and caused his murder. The medical evidence on record shows that external injury No.3 sustained by the deceased was sufficient in the ordinary course of nature to cause his death. The cause of death of the deceased, according to the medical evidence, was shock due to hemorrhage as a result of injury to aorta. On the pretext of compromise talks, the deceased and others were asked to come to the house of original accused No.2, but on way, the convicted appellant had inflicted knife blows as a result of which the deceased had sustained serious injuries and lost his life. In fact, the evidence on record shows that he was declared dead before he was brought to the hospital. The convicted appellant had, arming himself with a deadly weapon like knife, assaulted the deceased, who was totally unarmed and lame. Under the circumstances, it will have to be held that the case would fall under clause thirdly of Section 300 IPC and that the conviction of the appellant under Section 302 IPC cannot be regarded as illegal. So also, the convicted appellant had committed breach of notification issued by the competent authority under Section 37 of the Act which is quite evident from contents of Exh.63. Therefore, his conviction under Section 135 of the Act also cannot be regarded as erroneous. Having regard to the facts of the case, this Court finds that the

conviction of the convicted appellant under Section 302 IPC and Section 135 of the Act is well founded and no ground is made out to interfere with the same in his appeal. Therefore, the appeal filed by him is liable to be dismissed.

15. As far as acquittal appeal is concerned, this Court finds that the learned Judge of the trial Court has given cogent and convincing reasons for acquitting original accused Nos.2 & 3 of the offence punishable under Sections 302 read with 34 IPC. Those reasons are to be found in paragraphs 39, 40 & 41 of the impugned judgment. If original accused Nos.2 & 3 had shared the common intention of the convicted appellant to cause murder of the deceased, they would have inflicted stick blows immediately on seeing him in the same manner as knife blow was given by the convicted appellant on the deceased. The claim made by the witnesses that original accused Nos.2 and 3 had inflicted stick-blows after he was overtaken and inflicted further knife blows by the convicted appellant does not find support from medical evidence. In fact, the medical evidence would show that no injury was sustained as such by the deceased which could have been caused by stick. According to medical evidence, injury No.4 was such which was possible due to fall on the ground. Having regard to the facts of the case, this Court is of the opinion that the learned Judge of the trial Court was justified in according benefit of doubt to original accused Nos.2 & 3. So also, no satisfactory evidence could be led by the prosecution to establish charge against original accused Nos.1, 4 & 5 for commission of offence punishable under Sections 201 read with 34 IPC. In fact, the trial Court has acquitted the appellant of the offence punishable under Sections 201 read with 34 IPC, but that acquittal is not subject matter of challenge before this Court. When acquittal of the convicted appellant under Sections 201 read with 34 IPC is accepted by State Government, it would not be proper for the Court to consider the question, whether original accused Nos.4 & 5 should have been convicted of the offence punishable under Sections 201 read with 34 IPC. No evidence as such is adduced to establish that original accused No.1, i.e. convicted appellant, and accused No.4 as well accused No.5 had caused disappearance of knife which was used in commission of crime. The learned Judge has given cogent and convincing reasons for acquitting original accused Nos.2 and 3. After scrutinising the evidence in detail, the learned Additional Public Prosecutor has failed to dislodge those reasons. Under the circumstances, acquittal appeal has no substance, and is liable to be dismissed.

16. For the foregoing reasons, both the appeals fail, and are dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(M.C. Patel, J.)

Rajendra